

HOUSE OF LORDS

Delegated Powers and Regulatory Reform  
Committee

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27th Report of Session 2015–16

**Housing and  
Planning Bill:  
Government  
Amendments**

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### *The Delegated Powers and Regulatory Reform Committee*

The Committee is appointed by the House of Lords each session and has the following terms of reference:

(i) To report whether the provisions of any bill inappropriately delegate legislative power, or whether they subject the exercise of legislative power to an inappropriate degree of parliamentary scrutiny;

(ii) To report on documents and draft orders laid before Parliament under or by virtue of:

- (a) sections 14 and 18 of the Legislative and Regulatory Reform Act 2006,
- (b) section 7(2) or section 19 of the Localism Act 2011, or
- (c) section 5E(2) of the Fire and Rescue Services Act 2004;

and to perform, in respect of such draft orders, and in respect of subordinate provisions orders made or proposed to be made under the Regulatory Reform Act 2001, the functions performed in respect of other instruments and draft instruments by the Joint Committee on Statutory Instruments; and

(iii) To report on documents and draft orders laid before Parliament under or by virtue of:

- (a) section 85 of the Northern Ireland Act 1998,
- (b) section 17 of the Local Government Act 1999,
- (c) section 9 of the Local Government Act 2000,
- (d) section 98 of the Local Government Act 2003, or
- (e) section 102 of the Local Transport Act 2008.

### *Membership*

The members of the Delegated Powers and Regulatory Reform Committee are:

Baroness Drake	Lord Lisvane
Baroness Fookes ( <i>Chairman</i> )	Countess of Mar
Lord Flight	Lord Moynihan
Baroness Gould of Potternewton	Lord Thomas of Gresford
Lord Jones	Lord Tyler

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### *Contacts for the Delegated Powers and Regulatory Reform Committee*

Any query about the Committee or its work should be directed to the Clerk of Delegated Legislation, Legislation Office, House of Lords, London, SW1A 0PW. The telephone number is 020 7219 3103 and the fax number is 020 7219 2571. The Committee's email address is [hldelegatedpowers@parliament.uk](mailto:hldelegatedpowers@parliament.uk).

### *Historical Note*

In February 1992, the Select Committee on the Committee work of the House, under the chairmanship of Earl Jellicoe, noted that "in recent years there has been considerable disquiet over the problem of wide and sometimes ill-defined order-making powers which give Ministers unlimited discretion" (Session 1991–92, HL Paper 35-I, paragraph 133). The Committee recommended the establishment of a delegated powers scrutiny committee which would, it suggested, "be well suited to the revising function of the House". As a result, the Select Committee on the Scrutiny of Delegated Powers was appointed experimentally in the following session. It was established as a sessional committee from the beginning of Session 1994–95. The Committee also has responsibility for scrutinising legislative reform orders under the Legislative and Regulatory Reform Act 2006 and certain instruments made under other Acts specified in the Committee's terms of reference.

# Twenty Seventh Report

## HOUSING AND PLANNING BILL: GOVERNMENT AMENDMENTS

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1. We considered this Bill in our 20th and 21st Reports of this Session.<sup>1</sup> The Government have so far tabled four sets of amendments for Report Stage, published on 24 March, and on 4, 6 and 12 April. Several of these amendments would either introduce new delegated powers into the Bill or affect existing powers on which we have already reported. We deal in turn with a number of these below; but before doing so we wish to make some observations about the timetabling of Committee and Report Stages of the Bill, the provision of delegated powers memoranda and the quality of the Government responses.
2. The recent chronology of the Bill is that—
  - Committee Stage concluded on 23 March, the day the House rose for the Easter recess; and
  - Report Stage began the first day back, on 11 April.During this time—
  - Government amendments were published during the recess on 24 March, 4 April and 6 April; and
  - supplementary delegated powers memoranda were provided by the Minister with letters dated 6 and 8 April.<sup>2</sup>
3. As a result, the Committee was afforded no opportunity to assist the House by reporting in advance of the start of Report Stage on amendments to be debated during this first week; and it is for this reason that this report includes comments on amendments which have already been debated at Report Stage.
4. Time and again, the House has indicated the value it places on the reports of this Committee in bringing to light issues relating to the delegations of power by bills. This Bill has given rise to a particularly large number of comments and recommendations by the Committee. It is therefore especially disappointing that Report Stage was scheduled so soon after Committee Stage, without the benefit of any intervening *sitting* days.
5. It is also disappointing that we have felt it necessary to comment adversely on aspects of the delegated powers memoranda provided by the department.

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1 20th Report, Session 2015–16, [HL Paper 90](#); and 21st Report, Session 2015–16, [HL Paper 98](#).

2 Supplementary memoranda were received on 6 April: <http://www.parliament.uk/documents/lords-committees/delegated-powers/HousingandPlanningBill-SupplementaryDPM-BnsWilliamstoBnsFookes-060416.pdf>, and 8 April: <http://www.parliament.uk/documents/lords-committees/delegated-powers/HousingandPlanningBill-FurtherSupplementaryDPM-BnsWilliamstoBnsFookes-080416.pdf>. A further supplementary memoranda has been provided, dated 12 April: <http://www.parliament.uk/documents/lords-committees/delegated-powers/HousingandPlanningBill-FurtherSupplementaryDPM2-BnsWilliamstoBnsFookes-120416.pdf>

In our report on the Bill itself, we describe the original memorandum as “variable in quality”,<sup>3</sup> and we note that amendments were tabled at Committee Stage in relation to clause 2 for which no delegated powers memorandum was provided at all. The Minister acknowledges this omission in her letter of 6 April.

6. Finally, we wish to raise an issue about the Government’s response to our original report on the Bill.<sup>4</sup> In our recent report on the Strathclyde Review,<sup>5</sup> we set out our findings following an analysis of the outcome of our recommendations during the current session. We commented:

“The figure emerging from our analysis which has caused us greatest concern is the one relating to those recommendations which have received no reaction at all. In this context, we draw the attention of departments to the Cabinet Office’s Manual ... which makes clear that departments have to respond to DPRRC reports and, from this we take it to mean, that they must respond to each and every recommendation we make in our reports”.<sup>6</sup>

7. It is a matter of regret that the Government’s response to this Bill, so soon after the publication of our report on the Strathclyde Review, gives us cause for continued concern in that a number of our recommendations received no comment at all.<sup>7</sup>

### **Clause 2: Regulations about “starter homes”**

8. Clause 3 requires English planning authorities to carry out their functions with a view to promoting the supply of “starter homes”. Clause 2 addresses the question “what is a starter home?”, and defines it by reference to a person who is a “qualifying first-time buyer”. Government amendments published on 4 April for Report Stage amend subsection (3) of clause 2 to specify a minimum age for a person to be a “qualifying first-time buyer” and accordingly to remove the power to specify a minimum age in regulations. We welcome that additional provision on the face of the Bill.
9. The amendments remind us that we have yet to report on two other Government amendments, affecting the delegated powers in clause 2, which were accepted at Committee Stage. We have been unable to report on these amendments before now because the Government failed until last week to provide us with the required memorandum to explain the new powers.<sup>8</sup>
10. At Committee Stage, the Government amplified in two respects the regulation-making powers conferred by clause 2. First, subsection (7) was amended to add new paragraphs (b) and (c), enabling regulations to disapply or modify the age condition in subsection (3) in particular cases or circumstances. We have no concerns about this means of bringing further persons (who would not otherwise qualify) within the definition of “qualifying first-time buyer”, particularly in view of the affirmative procedure that will apply to all regulations under clause 2. Second, a new subsection (10) was added, so

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3 21st Report, Session 2015–16, [HL Paper 98](#), para 11,

4 26th Report, Session 2015–16, [HL Paper 125](#), Appendix 2.

5 25th Report, Session 2015–16, [HL Paper 119](#), para 28.

6 *Ibid.*, para 28.

7 See, for example, para 22 of this report.

8 Supplementary memorandum dated 6 April. See n2 above.

that “Regulations under this section may amend this Chapter”, a new Henry VIII power that certainly requires explanation.

11. In paragraph 13(c) of their memorandum accompanying the Minister’s letter dated 6 April 2016, the Government explain the power as “parasitic on the regulation-making powers already taken” which will–

“assist in keeping the primary legislation up to date and in a more usable form. The primary legislation can, if appropriate, tell the whole legislative story, rather than, for example, definitions being split across different instruments”.

In the present context the Government envisage that where, for instance, a list of different categories of persons exempt from the age condition in subsection (3) were specified in regulations under subsection (7), “the list could be inserted into Chapter 1 as a new section” by using the new power in subsection (10).

12. While we see no objection to such a device in this isolated instance, we would be very concerned if it were adopted by the Government as a general approach for enabling future structural changes in Acts. As a general rule, the deployment of Henry VIII powers should be exceptional, and reserved for specific, closely controlled and carefully justified purposes; they should not become a routine feature of Bills simply to facilitate presentational re-engineering.
13. **We draw these observations to the attention of the House.**

#### Clause 67: high value local authority housing

14. Clause 67(1) enables the Secretary of State to make a determination requiring a local housing authority to make a payment to him of an amount calculated by reference to the authority’s interest in certain high value housing. A determination may apply to a particular authority, to a category of authorities or to all authorities, as is clear from clause 69(1) and (2). Clause 67(8) also requires the Secretary of State to define “high value” in negative regulations, which can be done in different ways for different areas.
15. In our 20th Report, we found it inappropriate to delegate the power to determine these payments without any form of parliamentary control, particularly with so little detail on the face of the Bill.<sup>9</sup> We recommended that the power in clause 67(1) should be exercisable by statutory instrument, subject to affirmative procedure where the determination applied to more than one authority, otherwise negative procedure. Furthermore, the Bill itself should set out the factors by reference to which the power to define “high value” in regulations might be exercised under clause 67(8), and that that power should require the affirmative procedure whenever exercised.
16. The Government’s reaction to our recommendations is again disappointing. The Minister’s response<sup>10</sup> rejected each of them in turn, as is reflected in the Government’s amendments to clause 67.<sup>11</sup> So far as they affect the power of determination, they merely substitute “higher value” for “high value”, and, in connection with clause 67(8), they amplify the power to define “higher

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<sup>9</sup> Paragraphs 23, 26 and 27.

<sup>10</sup> 26th Report, Session 2015–16, [HL Paper 125](#), Appendix 2, paras 12–24.

<sup>11</sup> Nos. 54, and 56-61 in the Marshalled List.

value” by making it exercisable differently in relation to different kinds of housing and different authorities, in addition to different areas; and they afford the Secretary of State wide flexibility in the use of comparators when formulating the definition.

17. **These enhancements of the power serve merely to reinforce our earlier recommendation in favour of the affirmative procedure for regulations under section 67 (8). We also reiterate our earlier view that the significance of the determinations proposed under clause 67(1) makes them unsuitable for the exercise of Ministerial discretion without parliamentary control, and that it is unsatisfactory that the key concept of “higher value” should be left for definition in regulations, unconstrained by factors set out in the Bill.**
18. On this last point, we would observe again that these provisions are being presented to the House before the underlying policy is sufficiently developed to afford Members a clear basis for discussing it. In that respect, we find the Minister’s insistence that it is not yet feasible to include relevant factors on the face of the Bill<sup>12</sup> to be somewhat at odds with her insistence that the affirmative procedure would prevent early progress with implementation after Royal Assent.<sup>13</sup>

#### Clauses 78 to 89: “rent regulations” about mandatory rents

19. Clause 78(1) enables the Secretary of State to make provision about the levels of rent that an English local housing authority must charge a high income tenant of social housing. These regulations are subject to the negative procedure,<sup>14</sup> and are described as “rent regulations”. The powers are extensive, being supplemented by clauses 79, 80 and 82 to 85. In particular, clause 84 enables the regulations to require an authority to make payments to the Secretary of State in connection with increased amounts of rental income derived by virtue of the regulations. Once again, these powers are almost entirely enabling, with very little provision on the face of the Bill about the way in which they might be exercised.
20. Given the significance of the powers and the heavy reliance on secondary legislation, we made several recommendations in our 20th Report.<sup>15</sup> We welcome the fact that one Government amendment<sup>16</sup> gives effect to our recommendation that the affirmative procedure should apply on the first exercise of the powers to make “rent regulations”. However, we are surprised that the Minister rejected<sup>17</sup> our other recommendations.
21. **We remain of the view that there should be more on the face of clause 79 to define the key expression “high income”. We regard the sub-delegation to guidance of provision concerned with the determination of rent (clause 78(4)) and the calculation of income (clause 79(2)(f)) as inappropriate because it will elude any form of Parliamentary control.**

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12 Paragraph 22

13 Paragraph 24.

14 One Henry VIII power (in clause 83) requires the affirmative procedure where amending primary legislation.

15 Paragraph 42.

16 No. 133 in the Marshalled List.

17 26th Report, Session 2015–16, [HL Paper 125](#), Appendix 2, paras 25–29.

22. We were especially surprised that the Minister's response on these clauses (brief as it was) made no reference at all to our recommendations about provision included in regulations by virtue of clause 84.
23. **We remain of the view that regulations that include such provision should require the affirmative procedure whenever made.**
24. On 11 April, the Government tabled a further amendment<sup>18</sup> to clause 78 to enable "rent regulations" to "create exceptions for high income tenants of social housing of a specified description". It is not wholly clear to us whether it is intended to be the description of tenant or the description of housing that must be specified. Unfortunately, as the Government have provided no memorandum in connection with this new power, we have had no explanation from them about how the provision is intended to work.
25. **We draw this apparent ambiguity to the attention of the House.**

#### **Clauses 145 to 148: processing of planning applications**

26. In our 21st Report, we made a number of recommendations about the powers conferred in clauses 145 to 148 in connection with the establishment of what amount to pilot schemes, to test out in particular areas alternative arrangements for the processing of planning applications.<sup>19</sup> **We warmly welcome both the helpful response from the Minister<sup>20</sup> to these recommendations and the amendments tabled by the Government<sup>21</sup> which seek to give effect to almost all of them.**
27. We would mention only three matters about these clauses:
- Amendment No. 120 substitutes three new subsections for two existing subsections in clause 145. It is not absolutely clear to us to which of the new subsections the affirmative procedure introduced by Amendment No. 134 would apply. **We draw this lack of clarity to the attention of the House.**
  - Amendment No. 121 requires the Secretary of State to review alternative arrangements and either "to lay a report before each House of Parliament" or "to make a statement to the House of Parliament of which that Secretary of State is a member". **That seems to us to be a very unusual requirement, and we draw it to the attention of the House.**
  - The introduction of the affirmative procedure by Amendment No. 134 has led to the inclusion of an additional amendment, Amendment No. 137, to ensure that any affirmative regulations under clause 145 will not attract the hybrid instrument procedure in this House. **In accordance with our usual practice, we draw that change to the attention of the House, so that it may invite the Minister to satisfy it that interests that would otherwise be protected by that procedure will be adequately protected by other means.**

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18 No. 73A in the Marshalled List.

19 Paragraph 44.

20 26th Report, Session 2015–16, [HL Paper 125](#), Appendix 2, paras 47–51.

21 Nos. 120, 121, 134 and 137 in the Marshalled List.

### Clauses 149 and 150: urban development areas etc.

28. Clauses 149 and 150 amend sections 134 and 135 of the Local Government, Planning and Land Act 1980 (“the 1980 Act”) which provide for the designation of urban development areas and the establishment of urban development corporations. Each power is exercisable by an order which requires an affirmative procedure. Orders of this kind have in the past frequently been treated as hybrid instruments in this House, thereby engaging a procedure that is unique to this House.<sup>22</sup> Clauses 149 and 150 would reduce the level of parliamentary scrutiny for these orders to negative procedure, with the result that the right to petition this House under its hybrid instruments procedure would no longer apply in relation to them.
29. In our 21st Report, we invited the House to consider whether the Government had sufficiently justified the proposed removal of the hybrid instruments procedure, and whether the consultation exercise to be carried out by the Government before making an order was an adequate substitute for the right to petition this House.<sup>23</sup> We also recommended that, irrespective of any removal of the hybrid instruments procedure in this case, the affirmative procedure should continue to apply to these orders.<sup>24</sup>
30. We welcome the fact that the amendments tabled by the Government re-instate the affirmative procedure, but we note that they also insert a new subsection into each of sections 134 and 135 of the 1980 Act to provide for the orders *not* to be treated as hybrid instruments.<sup>25</sup> The Minister’s response merely reasserts the Government’s belief that their proposed consultation exercise affords an adequate substitute for a right to petition the House.<sup>26</sup>
31. We are troubled by the consideration that the hybrid instruments procedure—which exists only for the purpose of ensuring that private rights are properly protected when affected by secondary legislation—is at risk of being eroded in a piecemeal fashion, to an extent where it may ultimately become obsolescent. Clearly, if the procedure is to be abandoned, that ought to be preceded by a proper examination of its purpose and operation, leading to a deliberate decision of the House, rather than by a process of attrition in successive Bills to the point of extinction.
32. **For these reasons, we draw Amendments No. 127 and No. 128 to the attention of the House in so far as they would remove the hybrid instrument procedure for these orders under the 1980 Act, and we urge it to give the issue the consideration recommended in our 21st Report.**

### Clauses 184 and 185: reporting and disposal of “surplus land”

33. Clause 184(1) requires a relevant public authority to prepare and publish reports containing details of “surplus land”. That expression is defined in subsection (3), whilst a “relevant public authority” is defined to mean a Minister of the Crown or a public authority specified or described in negative regulations in subsection (4). Clause 185 amends section 98 of the 1980 Act to enable the Secretary of State to direct a relevant public authority to take

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22 See our 21st Report, Session 2015–16, [HL Paper 98](#), Appendix 1.

23 Paragraph 54.

24 Paragraph 57.

25 Nos. 127 and 128 in the Marshalled List.

26 26th Report, Session 2015–16, [HL Paper 125](#), Appendix 2, para 53.



steps to dispose of its interest in land which he considers is used insufficiently for the purpose of the body's functions. Such a direction can be given only in "specified circumstances"—that is, in circumstances specified in negative regulations.

34. In our 21st Report, we recommended that "relevant public authority" (clause 184) and "specified circumstances" (clause 185) should be defined in the Bill, in the way they are for equivalent existing provision in the 1980 Act, and that the House should seek an explanation (not provided in the Government's original memorandum)<sup>27</sup> why they were not.<sup>28</sup> These definitions are important. We note that "public authority" is defined in clause 184(12) as "a person with functions of a public nature". This is a broad definition and means that the power under clause 185 is potentially very wide-ranging and could be exercised to include bodies other than local government bodies. For this reason we took the view that, even if an explanation proved satisfactory, the regulations defining each expression should require the affirmative procedure, and those defining "relevant public authority" should be subject to prior consultation.
35. We thought the Minister's preliminary response, that she was minded to look favourably on our recommendations, to be rather encouraging.<sup>29</sup> We were, therefore, disconcerted to discover that Amendment No. 129, tabled by the Government, has the effect of applying the affirmative procedure to regulations under clause 185 alone. This shortfall is not explained, or even alluded to, in the Minister's further response to our recommendation;<sup>30</sup> nor is it explained in any supplementary memorandum from her department.
36. **We remain of the view that regulations which define "relevant public authority" for the purposes of clauses 184 and 185 should require the affirmative procedure and should be subject to consultation before being laid in draft; and we recommend accordingly.**

#### Clause 190: regulations defining "banning order offence"

37. Under clause 14(1) a local housing authority may apply for a banning order against a person who has been convicted of a banning order offence. That is a significant step, because such an order would have the effect of, among other things, banning the person from letting housing or from engaging in letting agency work or property management work. Yet, according to clause 13(3), the definition of "banning order offence" is to be entirely in negative procedure regulations. In our 20th Report, we observed that it is inappropriate that the definition should be left to the discretion of the Secretary of State exercisable in regulations with only a modest level of Parliamentary scrutiny, and we recommended that the "banning order offences" should be listed in the Bill, with a delegated power to amend the list by affirmative procedure regulations.<sup>31</sup>
38. We are disappointed that the Government's Amendment No. 131 does no more than require the affirmative procedure for regulations under clause 13(3), without including more on the face of the Bill about the "banning

27 <http://www.parliament.uk/documents/lords-committees/delegated-powers/HousingandPlanningBillDelegatedPowersMemo.pdf>

28 Paragraph 65.

29 26th Report, Session 2015–16, [HL Paper 125](#), Appendix 2, para 55.

30 Letter from Baroness Williams of Trafford to Baroness Fookes dated 6 April 2016. See n2 above.

31 Paragraphs 8 and 9.

order offences” themselves. In her response to our recommendation, the Minister gave as a reason for not including more in the Bill her intention to consult on draft regulations in order “... to get the details of these offences right ...”.<sup>32</sup> However, we regard this as a further example of legislation being presented to Parliament before the underlying policy is properly formulated.

39. **We repeat our earlier conclusion that it is inappropriate to delegate to secondary legislation the entire definition of a key element in the conditions that may lead to a banning order being made.**

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32 Paragraphs 2–7 in Appendix 2 of our 24th Report, Session 2015–16, [HL Paper 125](#).

## **APPENDIX 1: MEMBERS AND DECLARATIONS OF INTERESTS**

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Committee Members' registered interests may be examined in the online Register of Lords' Interests at [www.publications.parliament.uk/pa/ld/ldreg.htm](http://www.publications.parliament.uk/pa/ld/ldreg.htm). The Register may also be inspected in the House of Lords Record Office and is available for purchase from The Stationery Office.

For the business taken at the meeting on 13 April 2016 Members declared no interests.

### **Attendance:**

The meeting on the 13 April 2016 was attended by Baroness Drake, Lord Flight, Baroness Fookes, Baroness Gould of Potternewton, Lord Jones, Lord Lisvane, Lord Moynihan, Lord Thomas of Gresford and Lord Tyler.